Supreme Court, U.S.
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No. 02-682

IN THE
Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF CONSUMERS UNION AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Consumers Union, publisher of *Consumer Reports* magazine, is a non-profit, independent testing and consumer protection organization serving only consumers. Since 1936, Consumers Union has been a comprehensive source for unbiased reporting about goods, services, health, personal finance, and other consumer concerns. The organization is funded solely from the sale of *Consumer Reports* (in print and online) and other services, and from nonrestrictive, noncommercial contributions, grants, and fees.

Consumers Union engages regularly in consumer advocacy before the executive, judicial, and legislative branches of government. Consumers Union is committed to securing for consumers the benefits that inure from competitive telecommunications markets, especially lower prices and improved quality of service.

The Consumer Federation of America (CFA) counts among its members more than 285 consumer advocacy and education organizations throughout the nation with a combined membership exceeding 50 million people. CFA disseminates information on consumer issues, provides support to national, state, and local organizations committed to consumer advocacy and education, and conducts policy studies that examine aspects of the marketplace and their consumer impacts. CFA works as an advocate for pro-consumer policy before federal and state legislatures and regulatory agencies, and the courts. The breadth of CFA's membership enables CFA to speak for virtually all consumers on decisions that affect their lives.

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. In letters filed with the Clerk of the Court, the parties have consented to the filing of all amicus briefs.

CFA has consistently advocated policies and programs that help ensure, among other things, a marketplace with vigorous competition and adequate consumer redress. An important area of focus for CFA has been utilities. To advance the interests of consumers, CFA has advocated greater competition in telephone, electric, and natural gas markets while seeking to ensure that consumers share in the benefits of this competition.

Consumers Union and CFA respectfully submit this brief *amicus curiae* because a proper, pro-consumer application of the antitrust laws is particularly important in the telecommunications industry. Competitive conditions in this industry touch virtually every consumer. We believe that vigorous, beneficial competition can most likely be achieved by adhering to the congressional design of allowing regulation and antitrust enforcement to complement each other, and by interpreting the antitrust laws as intended by Congress with the welfare of consumers as the principal policy objective. Consumers Union and CFA also regard it as vital that consumers, who are often the immediate focus and always the ultimate victims of anticompetitive conduct, have standing to vindicate their rights under the antitrust laws.

SUMMARY OF ARGUMENT

In this case, Petitioner seeks a radical narrowing of Section 2 of the Sherman Act, virtual immunity from antitrust scrutiny of its commercial dealings with rivals who threaten its monopoly of local telephone service, and protection from antitrust challenges by the very consumers whose economic welfare is the Sherman Act's primary goal. Those results are unwarranted, and the Court should affirm the judgment of the Court of Appeals reinstating Respondent's Complaint.

The Court should affirm regardless of any decision it might make on the issues of monopolization law that Petitioner and supporting *amici* have raised. Petitioner and *amici* restrict their focus to the requirements for proving that a monopolist's conduct is illegally exclusionary and the validity of the court of appeals' articulation of the monopoly leveraging doctrine. The question before the Court, however, is whether Respondent's Complaint states a valid claim. It does. The Complaint alleges all that is necessary to establish a violation of Section 2 of the Sherman Act, including allegations that Verizon's conduct was exclusionary and that Verizon has monopoly power in the relevant market.

A court may not dismiss a complaint unless under its allegations there is no conceivable set of facts that plaintiff could prove to establish a right to relief. The Complaint charges Verizon with monopolization. No one challenges the adequacy of Trinko's allegation that Verizon has monopoly power in the relevant market, the first element of the offense. Rather, Petitioner and *amici* address the standards for determining whether a monopolist's conduct is "exclusionary" by challenging the court of appeals' decision as it relates to refusals to deal and the essential facility doctrine.

Lost in the argument about essential facilities and refusals to deal, however, is the fact that the Complaint in this action sufficiently alleges illegal conduct by Verizon. In addition to an explicit allegation of exclusionary conduct, the Complaint includes other allegations that if proven would establish that Verizon's conduct was illegal, and makes particular factual allegations describing the exclusionary nature of the conduct. The United States asserts that the Complaint is deficient. Any such effort to color this matter as a true controversy must fail, since the Complaint far exceeds the standards required under the Federal Rules of Civil Procedure. However the Court might decide the antitrust

issues Petitioner and *amici* have raised, the result will be the same: the court of appeals' reinstatement of Trinko's Complaint will be affirmed.

A monopolist's conduct is exclusionary when it harms consumers and competition. The limited approach of restricting exclusionary conduct to that which makes no business sense apart from its tendency to create monopoly returns loses sight of the consumer welfare purpose at the heart of the Sherman Act in favor of a focus on the defendant's business. Effects on competition and consumers of the type alleged in the Complaint cannot be ignored simply because the defendant's conduct might have led to some business benefit, however slight.

The Court should also reject the call to deem refusals to deal illegal only when the defendant refuses to provide a competitor exactly what it is providing to others, on exactly the same terms. Such a rule would create a perverse incentive: a monopolist might choose never to share with competitors simply to avoid liability. In addition, creation of that rule would be inconsistent with the Court's general unwillingness to fashion special rules for Sherman Act cases, preferring instead to allow cases to be decided on their facts.

The essential facilities doctrine is a useful method for identifying exclusionary conduct, but this case is not an appropriate occasion for the Court to consider the validity or contours of the doctrine. The doctrine has been widely adopted by the lower courts, and, contrary to Verizon's suggestion, enjoys robust support in precedent. For the reasons summarized above, the doctrine should not be limited by the requirement that the refusal to provide a facility make "no business sense" apart from its capacity to enhance monopoly power.

This case is not an appropriate vehicle for considering the essential facilities doctrine. As discussed above, the Complaint sufficiently alleges illegal monopolization without reference to anyone's version of the doctrine. A ruling on the doctrine, moreover, would not have the benefit of a full record. Finally, there is little reason to believe that the courts' application of the doctrine has led to any of the dire results that its critics attribute to it.

Regulation under the Telecommunications Act of 1996 cannot justify *de facto* antitrust immunity for conduct in areas touched by that Act. The arguments offered to reach just that result have repeatedly been rejected when cast as arguments for explicit antitrust immunity. There is no factual basis for the *de facto* immunity sought here – only suppositions that regulation under the Act will work so perfectly that there is no role for the antitrust laws, and that antitrust enforcement will interfere unduly with that regulation. These suppositions are flatly inconsistent with the congressional design, which was to couple antitrust scrutiny with regulation under the 1996 Act. There is no reason to depart from the established method of determining the antitrust significance of regulation: by considering its impact in particular cases, and on the basis of facts, not supposition.

Respondent has standing to maintain this action. It is not disputed that the Complaint alleges injury-in-fact that constituted antitrust injury. In addition, the alleged injury is sufficiently direct to justify antirust standing, does not raise significant issues of apportionment or double recovery of damages, and is of a type that makes Trinko a suitable antitrust plaintiff.

Respondent is the immediate victim of the alleged conduct by Verizon. The effect on Trinko alleged in the complaint was an inevitable result of Verizon's actions, with no "chain of causation," because Verizon's local service

competitors had no alternative to dealing with Verizon and visiting on consumers the injuries that Verizon's conduct allegedly caused. In addition, the injury to plaintiff was "inextricably intertwined" with the injury to affected competitors. Plaintiff is a consumer in the market directly affected by the alleged conduct, and was thus directly disserved by the lessening of competition in that market. Finally, Trinko's injuries were a foreseeable and proximate result of the illegal conduct.

Respondent's claims will not lead to duplicative recovery or problems with the apportionment of damages. Trinko's injury – poor telephone service from competitive carriers – is distinct from those of the competitors, which will focus on lost competitive opportunities. In addition, this case does not involve any prospect of "passing on" that will complicate the task of ascertaining damages.

Consumers in Trinko's position have strong incentives to identify and prevent anticompetitive conduct by telephone monopolists. They face the Hobson's choice of choosing degraded service from competitors or dealing with an established monopolist. Disadvantaged competitors, moreover, cannot necessarily be counted on to vindicate the public interest in antitrust enforcement. Their incentive to pursue antitrust challenges like this is tempered by the knowledge that they depend on and must deal on a day-to-day basis with a powerful prospective defendant.

For all these reasons, the Court should affirm the judgment of the court of appeals.

ARGUMENT

I. THE COMPLAINT ALLEGES ALL THE ELEMENTS OF MONOPOLIZATION, INCLUDING EXCLUSIONARY CONDUCT

In this case the Court will determine whether dismissal is proper because the Complaint fails to state a claim upon which relief can be granted. Verizon proposes antitrust standards to be applied in making that determination, but its argument never once refers to the Complaint. This is understandable, because however the Court might resolve the issues Verizon raises, the Complaint states a valid claim of monopolization. The Court is really being asked, therefore, to affirm the decision of the Court of Appeals and return the matter to the lower courts with an advisory opinion on the law of monopolization. The Department of Justice and the Federal Trade Commission have in essence acknowledged that possibility. On Petition for a Writ of Certiorari to the United States District Court for the Second Circuit, *Brief for the United States and the Federal Trade Commission as Amici Curiae* at 18-19. Notwithstanding that acknowledgement, the United States asserts that because the Complaint does not adequately allege that Verizon's conduct was exclusionary, the action should be dismissed.[2]

A claim of illegal monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that

[2] United States Br. at 28-29. The United States also criticizes the court of appeals' discussion of monopoly leveraging. Since the Complaint properly alleges the element that is said to be missing from the court of appeals' monopoly leveraging discussion – monopoly power in the relevant market – the disposition of this matter could not be affected by a ruling on the issue. The United States comes close to conceding that the allegations of the Complaint make any dispute about monopoly leveraging a moot point. *Id.* at 26 n.12.

power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The Complaint alleges the requisite market power, J.A. 45 (Am. Compl. ¶ 48), and the adequacy of that allegation is not questioned. The only remaining issue, therefore, is whether the Complaint adequately alleges the second *Grinnell* element, "exclusionary conduct." *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). The United States is wrong in judging the Complaint deficient in that regard.

A complaint may be dismissed only if, under its allegations, there is no conceivable set of facts that the plaintiff could prove to establish a right to relief. *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Complaints, moreover, need not detail the factual basis of the plaintiff's claims, but must only give fair notice of the claims the defendant faces. *Swierkewicz v. Sorema*, 534 U.S. 506, 512 (2002).

Trinko's Complaint more than meets these requirements. It alleges that Verizon engaged in "exclusionary and anticompetitive behavior"; attempted to reduce competitors' market share "on a basis other than efficiency;" and, "impaired competition . . . in an unnecessarily restrictive way." J.A. 46 (Am. Compl. ¶ 52). In addition, the Complaint alleges that Verizon lacked a valid "business reason" for its conduct. J.A. 47 (Am. Compl. ¶ 57). Each of these allegations describes exclusionary conduct. *See Aspen Skiing*, 472 U.S. at 604, 605, 608-09.

The Complaint also identifies particular exclusionary behavior. It alleges that Verizon provided service to competitors at a lower level than it provided itself, J.A. 39, 46 (Am. Compl. ¶¶ 21, 54); deviated from its normal schedule for filling competitors' orders, J.A. 39 (Am. Compl. ¶ 21); failed to fill competitors' orders on a timely basis or at all, *id.*; and failed to inform competitors of the status of their orders, *id.* The Complaint goes on to allege that Verizon's behavior injured competitors and adversely affected consumers' ability to obtain satisfactory telephone service. J.A. 47 (Am. Compl. ¶ 57). A showing that conduct by a monopolist degrades the service consumers receive and injures competitors can establish that that conduct is exclusionary. *Aspen Skiing* 472 U.S. at 605 ("impact on consumers and whether [conduct] has impaired competition in an unnecessarily restrictive way" is relevant to exclusionary characterization).

According to the United States, all this is not enough, because Trinko was required to plead that Verizon's conduct "would not make business sense unless it tended to eliminate or lessen competition."[3] Whatever merit this has as an articulation of the exclusionary conduct requirement, it is not the only way to notify a defendant of a claim for monopolization, even when access to the monopolist's facilities may be at issue. The various formulations of the conduct element articulated in *Aspen Skiing* are proof enough of that. *Aspen Skiing* 472 U.S. at 604, 605, 608-09. The Complaint alleges that Verizon's conduct was exclusionary, anticompetitive, and unnecessarily restrictive; it further alleges that the conduct lacked valid business reasons, injured competitors and adversely affected

[3] United States Brief at 28. The United States also calls for allegations related to prices, costs and profitability. *Id.* There is no requirement to plead such evidentiary detail in a complaint. *Swierkewicz v. Sorema*, 534 U.S. at 511-12.

consumers. It also identifies particular respects in which that conduct harmed consumers and competition. Those allegations unquestionably notify Verizon of the nature of and basis for Respondent's claim. That is all that is required in a complaint, *Swierkewicz v. Sorema*, 534 U.S. at 514, and for that reason the decision of the Court of Appeals must be affirmed.

II. THE COURT SHOULD NOT RESTRICT THE STANDARDS FOR IDENTIFYING EXCLUSIONARY CONDUCT

A. A Finding of Exclusionary Conduct Should be Grounded in Consumer and Competitive Harm

A monopolist's conduct is illegal when, considering its impact on consumers, it "impaired competition in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605. This standard for exclusionary conduct is directed to the consumer welfare purpose at the heart of the Sherman Act, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), yet flexible enough to encompass the many varieties of conduct that might illegally maintain or extend monopoly power.

Verizon and *amici* would restrict exclusionary conduct to that which makes no business sense apart from its tendency to create monopoly returns. Brief for Petitioner at 21, 22; United States Brief at 15 ("no economic sense"), 16. This limited test fails to encompass the harms at which Section 2 is directed. By focusing entirely on the defendant's perspective and its reasons for its conduct, the "no business sense" approach overlooks the effect of the challenged conduct on competition and consumers. "[A]n expectation of consumer harm must always be at the logical end of any determination that a particular act 'monopolizes,' and thus satisfies §2's conduct requirement." 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651d1, at 80.

Under the Complaint, it is open to Trinko to prove that, as a result of Verizon's conduct, Verizon itself performed less efficiently, its rivals were less capable competitors, competition suffered, and consumers were worse off. J.A. 39, 46, 47 (Am. Compl. ¶¶ 21, 54, 57). It cannot be that these effects are of no consequence if the monopolist can establish that its conduct led to some business benefit, however slight. Rather, the legality of such conduct depends on an overall assessment of net competitive effect – whether the conduct is "unnecessarily restrictive." *Aspen Skiing*, 472 U.S. at 605; *see also United States v. Microsoft*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc; per curiam*) (balance competitive harm against business justification).

The Court should also reject Verizon's proposal to restrict illegality to circumstances in which the defendant refuses to provide a competitor exactly what it is providing to others on exactly the same terms. Verizon arrives at this by deriving a rule essentially restricted to the facts of certain of the Court's decisions. Brief for Petitioner at 17-19. As an initial matter, the proposed rule would be unwise from the competitive point of view. It would give monopolists a perverse incentive to guarantee against refusal to deal liability by refusing to deal with competitors at all, even when that relationship might be pro-competitive.

More generally, the Court has rejected invitations to fashion special rules that would rigidly confine the inquiry in Sherman Act cases. The consistent lesson of the Court's monopolization decisions has been that cases should be decided by careful attention to their facts. In *Aspen Skiing* the Court declined to be bound to the fact pattern of its earlier decision in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). *Aspen Skiing*, 472 U.S. at 603 (rule establishing monopolist's duty to deal "not so narrow that it encompasses no more than the circumstances of *Lorain Journal*").

The Court reaffirmed this approach in its 1992 *Kodak* decision:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record."

Eastman Kodak Co. v. Image Tech. Svcs., Inc., 504 U.S. 451, 466-67 (1992), *quoting Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 579 (1925).

Here, too, the Court should eschew a formalistic rule and allow the case to proceed to an examination of "actual market realities." A variety of decisions illustrate why courts must have that flexibility if they are to protect consumers from the many exclusionary tactics that a monopolist might devise.[4] Such considerations are particularly significant in this case. Trinko's Complaint alleges that Verizon restrained competition and caused consumers to suffer poor service through conduct that as alleged would be illegal regardless of whether it is characterized as a refusal to deal. J.A. 39, 46, 47 (Am. Compl. ¶¶ 21, 54, 57). The proposed restrictions on refusal to deal doctrine might therefore have no application in this case.

[4] *E.g., Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), *cert. denied* 154 L.Ed. 2d 850 (2003); *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

B. The Essential Facilities Doctrine Provides a Useful Framework for Identifying Exclusionary Conduct

The essential facilities doctrine is normally understood to require a showing of four circumstances: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.[5] This articulation of the doctrine has gained wide acceptance in the lower courts. 1 ABA Section of Antitrust Law, Antitrust Law Developments at 279, n.283 (5th ed. 2002). By applying the four *MCI* factors, a court can systematically evaluate the effect of a monopolist's conduct. The United States finds that the *MCI* test can be "helpful," and details the relevance of three of its four elements. United States Brief at 21 n.6.

The United States proposes that the Court severely limit the doctrine by adopting the defendant-focused approach suggested above – that the challenged refusal of access must make "no business sense." United States Brief at 20-25. For all the reasons discussed above, that approach is fatally flawed, because it is at best a partial answer to the fundamental questions: whether a denial of essential facilities harms consumers and is anticompetitive. *Supra* Section I. If those questions are properly answered in an essential facilities case, the doctrine is a useful analytical approach that will yield beneficial results for consumers and competition.

[5] *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied* 464 U.S. 891 (1983). Even Professor Areeda found that the essential facilities doctrine yielded a correct result in *MCI*. Areeda, *The Essential Facility Doctrine: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, n.21 (1989).

Verizon argues primarily that the essential facilities doctrine as Verizon interprets it does not apply in this case, and urges the Court not to adopt the doctrine. Brief for Petitioner at 40-43. We agree with Petitioner that the Court should not consider the application of the essential facilities doctrine in this case, but for far different reasons.

According to Verizon, *MCI* is the only case imposing liability for unilateral action using an essential facilities approach. In *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1971), *cert. denied* 404 U.S. 1047 (1972), however, the essence of the essential facilities problem was the refusal of a lease-holder to waive a lease covenant that gave it exclusive access to a stadium to use for professional football games. Although the lease agreement formed the basis for a claim under Section 1 of the Sherman Act, the lease-holder's refusal was a unilateral act; there was no joint ownership of the stadium by competitors that could serve as a principled basis for distinguishing the decision as one involving concerted action. Similarly, *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) also involved a unilateral refusal to deal by a defendant who controlled a sports venue. Although the court found a conspiracy between that defendant and those who were given a lease to the facility, again the facility was not controlled by a collection of competitors. In addition, *Aspen Skiing* and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), indisputably cases of unilateral action, have been characterized by courts of appeals as essential facilities decisions. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376-377 (7th Cir. 1986) (*Aspen Skiing, Otter Tail*; Posner, J.); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 543 (9th Cir. 1991) (*Otter Tail*). The essential facilities doctrine, therefore, enjoys robust precedential support.

Nevertheless, this case is not an appropriate vehicle for a ruling on the essential facilities doctrine, for several

reasons. As discussed above, the Complaint alleges all the elements of illegal monopolization, including the exclusionary conduct that is said to be missing from the court of appeals' articulation of the essential facilities doctrine. *Supra* Section I; *see* United States Brief at 22. An essential facilities ruling by the Court, therefore, will not alter the result in this case. That ruling, moreover, would be based on the mere allegations of a complaint – the thinnest possible record at the earliest possible stage.

In addition, the treatment of the essential facilities doctrine in the lower courts suggests that there is no need for the Court now to reach out and rule on its validity or limits. In particular, it does not appear that the doctrine has caused the mischief attributed to it. In applying the doctrine, the lower courts have interpreted its elements to take into account the competitive concerns at stake.[6]

We respectfully submit that it would be prudent for the Court to await a more fully developed record before considering a ruling on the essential facilities doctrine.

C. Regulation Does not Justify *De Facto* Antitrust Immunity

The law concerning the effect of regulation on antitrust challenges to telephone monopolists has been characterized by two important principles. First, the consistent holding of courts before the passage of the Telecommunications Act of 1996 was that regulation of the telephone business does not

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[6] *See, e.g., Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986); *MCI, supra. See generally, Alaska Airlines, Inc. v. United Airlines*, 948 F.2d at 543 (finding facility "essential" only if it carries power to eliminate competition; analyzing *Twin Laboratories, Olympia* and *MCI* as making similar finding).

create immunity from the antitrust laws. *E.g., Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1005 (1985); *Phonetele, Inc. v. AT&T*, 664 F.2d 716 (9th Cir. 1981), *cert. denied* 459 U.S. 1145 (1983). The 1996 Act seemingly put the matter beyond question with a savings clause.[7] Second, lack of immunity notwithstanding, the effect of regulation on the market can be taken into account in judging the antitrust merits. *Southern Pacific*, 740 F.2d at 1000; *Phonetele*, 664 F.2d at 742-43.

Petitioner and the other incumbent telephone companies argue that the antitrust laws should not apply when allegedly illegal conduct implicates a duty subject to regulation under the 1996 Act. Brief for Petitioners at 34-39; *Brief Amicus Curiae of BellSouth Corporation, SBC Communications Inc., and Qwest Communications International Inc. In Support of Petitioner* at 22-30. It is hard to see the limit on this position, and Petitioner and *amici* suggest none. Its adoption would mean that virtually all commercial relations between incumbent carriers and the competitors to which they wholesale would be exempt from antitrust scrutiny. This was clearly not Congress' intent.

The arguments offered to justify this *de facto* immunity are essentially equivalent to the claims of "pervasive regulation" that were regularly rejected as a basis for immunity in the telephone industry *before* the Communications Act included an antitrust savings clause. *See, e.g., MCI*, 708 F.2d at 1101-05. For the reasons

[7] The "savings clause provides that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152 nt (b).

articulated in *MCI* and the consistent line of decisions to the same effect,[8] this claim should be rejected again.

A *per se* conclusion that the antitrust laws do not apply because regulation eliminates any risk to competition and antitrust law somehow threatens the regulatory apparatus is inconsistent with the evident intent of the 1996 Act's savings clause, which embodies a congressional judgment that there should be two legal regimes promoting telephone competition: regulation and antitrust. *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1281-82 (11th Cir. 2002), *cert. pending*, No. 02-1423. It does not do to assume, as Petitioner's exemption argument must, that the regulation that Congress created in the 1996 Act will work with virtual perfection to protect consumers, but that the congressional choice to couple regulation with antitrust scrutiny was so flawed that the Court must undo that choice.

There is no factual basis – nor evidence – for the conclusion that regulation will cure all competitive ills. Verizon would have the opportunity at trial to offer proof that regulation prevented harm to consumers from the conduct alleged in the Complaint. *See Phonetele*, 664 F.2d at 742 ("impact of regulation must be assessed simply as another fact of market life"). There is no warrant, however, for any court simply to assume without proof that that has occurred in this case, let alone in the broad class of cases the Court is asked to preempt. In the final analysis, the issue is the market effect of regulation, not what legislators wanted that market effect to be. *Southern Pacific*, 740 F.2d at 1000; *Phonetele*, 664 F.2d at 742-43. Making that determination requires evidence that is not yet before the Court.

[8] *E.g., Southern Pacific Communications v. AT&T, supra*; *Phonetele, Inc. v. AT&T, supra*; *Essential Communications Sys., Inc.* v. *AT&T*, 610 F.2d 1114 (3d Cir. 1979).

For the same reasons, the Court should reject the unsupported prediction that antitrust cases involving conduct regulated by the 1996 Act will threaten the regulatory scheme of the 1996 Act. It bears repeating that Congress explicitly confirmed that the legislative design includes action under the antitrust laws; courts cannot simply ignore that as an unwise choice. As this Court has previously demonstrated, the presence of regulation can decrease concerns about an antitrust court's role in decisions concerning regulated industries. *See Otter Tail*, 410 U.S. at 375-77; *see also* Areeda, *The Essential Facility Doctrine*, 58 Antitrust L.J. at 853. In addition, courts dealing with regulated industries have recognized that they must accommodate their rulings and remedies to avoid interference with the regulatory scheme. *E.g., Otter Tail*, 410 U.S. at 381-82. There is no reason to assume that they will shirk this duty.

III. RESPONDENT HAS STANDING TO MAINTAIN THIS ACTION

Under section 4 of the Clayton Act, any person "injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." 15 U.S.C. § 15. This broad grant is "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). This court has thus held that any limits on this broad grant must be based on congressional intent. *Associated General Contractors v. California Council of Carpenters*, 459 U.S. 519, 534-35 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472-73 (1982) ("in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives.").

In determining whether a plaintiff has standing under the antitrust laws, courts must assume the plaintiff can prove the facts alleged in its complaint. *Associated General Contractors*, 459 U.S. at 526; P. Areeda & H. Hovenkamp, *Fundamentals of Antitrust Law* ¶ 3.01, at 71 (2002).

Accepting the complaint's allegations, courts first ascertain that the plaintiff suffered injury-in-fact. Courts next examine whether the plaintiff has alleged antitrust injury. Finding both, the inquiry turns finally to ensuring that the plaintiff satisfies other prudential concerns, including ensuring a sufficiently direct claim, avoiding complex apportionment or duplication of damages and establishing that plaintiff is suitably positioned to vindicate the policies animating every antitrust action. As discussed below, Trinko satisfies these standing requirements.

It is clear from the Complaint that plaintiff suffered injury-in-fact. "Causation, or injury-in-fact, requires a showing that the injury of which the plaintiff complains actually resulted from those acts of the defendant that violated the antitrust laws." P. Areeda & H. Hovenkamp. *Fundamentals of Antitrust Law* ¶ 3.01d, at 68 (2002). The complaint alleges that Trinko experienced poor service. J.A. 48 (Am. Compl. ¶ 59). This poor service was "caused" by defendant's conduct. J.A. 47, 48 (Am. Compl. ¶¶ 57, 59). *See Associated General Contractors*, 459 U.S. at 542-43; *see generally Antitrust Law Fundamentals* ¶ 3.04. Verizon's use of its monopoly to impede its rival AT&T was the "material" and "substantial" cause of the plaintiff's injury. J.A. 47, 48 (Am Comp. ¶¶ 57, 59). *See Antitrust Law Fundamentals* ¶ 3.04 at 88 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969)). Trinko therefore demonstrates injury-in-fact sufficient to satisfy this aspect of the standing inquiry.

The "antitrust injury" that plaintiff must also demonstrate is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). *See also Associated General Contractors*, 459 U.S. at 539-40; *Antitrust Law Fundamentals* ¶ 3.03, at 77. The Court has been clear that "while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress, that is not the only form of injury remediable under § 4." *McCready*, 457 U.S. at 482-83 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979)). A central interest of the antitrust laws is "protecting the economic freedom of participants in the relevant market." *Associated General Contractors*, 459 U.S. at 538. As a consumer of local telephone service, Trinko was a participant in the market in which trade was restrained and felt the effects of the illegal conduct. J.A. 40 (Am. Compl. ¶ 23). *See Antitrust Law Fundamentals* ¶ 3.03. As alleged, Verizon's conduct limited competition in the local services market by degrading the services its rivals provided. This harm to AT&T's customers, therefore was the "very means by which it is alleged that [Petitioner] sought to achieve its illegal ends." *McCready,* 457 U.S. at 479. Trinko's injury flowed from that breakdown of competition, J.A. 48 (Am. Compl. ¶ 59), establishing antitrust injury. *See Antitrust Law Fundamentals* ¶ 3.03.

A. Trinko's Injury was Sufficiently Direct to Warrant Antitrust Standing

In determining antitrust standing, courts look to a plaintiff to show "that he is within the area of the economy which is endangered by a breakdown of competitive conditions." *Antitrust Law Fundamentals* ¶ 3.05f, at 107 (citations omitted). "Whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased

the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits." *McCready,* 457 U.S. at 475. Thus, the Court has held that if direct competitors as well as "the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready*, they would have a right to maintain their own treble damages actions against the defendants." *Associated General Contractors*, 459 U.S. at 541.

Respondent is such an immediate victim, and thus is entitled to recover. As was the case in *McCready,* 457 U.S. at 475 n.11, "[t]he nature of [the] injury is easily stated": As the direct result of Verizon's anticompetitive conduct, Trinko, and similarly situated consumers seeking a competitive alternative to Verizon, received poor services in the form of delays and generally inferior treatment. J.A. 40, 47, 48 (Am. Compl. ¶¶ 23, 57, 59). That Trinko's service was thus affected was an inevitable result of Verizon's actions. There was no intervening "chain of causation between the injury and the alleged restraint," because Verizon's competitors had no alternative to dealing with Verizon. *Associated General Contractors*, 459 U.S. at 540. This is direct injury that supports standing. In *McCready,* the plaintiff's employer could have elected to choose another plan, 457 U.S. at 480 n.17. AT&T had no such choice of underlying providers. The facilities AT&T purchased from Verizon and used to provide service to Trinko were solely available from Verizon by virtue of its monopoly over those lines. J.A. 40 (Am. Compl. ¶¶ 24-25).

Verizon contends that Trinko lacks standing because the injury suffered was indirect. Brief for Petitioner at 45-46. Petitioner's treatment of the directness of the injury is misplaced, *Antitrust Law Fundamentals* ¶ 3.05g, at 106 (privity not strictly required), and conveniently overlooks

this Court's analysis of the issue as summarized in *Associated General Contractors*:

> [I]n the *McCready* case, the plaintiff was the direct victim of unlawful coercion. As the Court noted, "McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services." Her status was thus comparable to that of a contracting or subcontracting firm that refused to yield to the defendants' coercive practices and therefore suffered whatever sanction that coercion imposed. Like McCready, and like Connell Construction Co., *such a firm could maintain an action against the defendants*.

459 U.S. at 540 n.44 (emphasis added, internal citations omitted). Here, as in *McCready,* Trinko was unavoidably the victim of Verizon's unlawful conduct. Trinko's service was degraded by Verizon's anticompetitive tactics. J.A. 48 (Am Compl. ¶ 59). Like McCready, Trinko did not to yield to the pressures of Verizon's illegal behavior. Accordingly, Trinko, like McCready, has standing to sue.

The injury to plaintiff was "inextricably intertwined" with the injury to the affected competitor. *McCready,* 457 U.S. at 484. *See also Associated General Contractors*, 459 U.S. at 538; *Antitrust Law Fundamentals* ¶ 3.05f, at 105. As in *McCready*, the injury "flows from that which makes defendants' acts unlawful" and does not "seek to label increased competition as a harm." *McCready*, 457 U.S. at 484; *Brunswick*, 429 U.S. at 488. Unlike the Union in *Associated General Contractors*, plaintiff is a consumer in the market in which trade was restrained, and thus was directly disserved by Verizon's efforts to hamper competition in the market. J.A. 46 (Am. Compl. ¶ 52). *See*

Associated General Contractors, 459 U.S. at 539. In this case, therefore, allowing Respondent's claims appropriately links recovery with procompetitive policy. *McCready*, 457 U.S. at 482; *Brunswick*, 429 U.S. at 488.

Respondent's injuries were also the foreseeable and proximate result of Petitioner's illegal conduct. *Associated General Contractors*, 459 U.S. at 535-36; *McCready,* 457 U.S. at 479*; Antitrust Law Fundamentals* ¶ 3.05a, at 96. As in *McCready*, the harm to Trinko was an integral aspect of the anticompetitive conduct, and thus "was precisely 'the type of loss that the claimed violations . . . would be likely to cause.'" 457 U.S. at 479 (quoting *Brunswick*, 429 U.S. at 489). In such circumstances, where a customer of a competitor suffers a direct injury from an anticompetitive scheme aimed principally at the competitors, the Court has found standing. *McCready*, 457 at 483-84; *Antitrust Law Fundamentals* ¶ 3.05f, at 106.

B. The Complaint Does Not Seek Damages that Will Lead to Complex Apportionment or Duplication

Respondent's claims will not lead to duplicative recovery or complex apportionment of damages. *Associated General Contractors*, 459 U.S. at 543-44. Respondent seeks "recovery for injuries distinct from those that other parties may have suffered." *Associated General Contractors*, 459 U.S. at 550 (Marshall, J. dissenting). Just as the antitrust injury suffered by the plaintiff in *McCready* was distinct from the antitrust injury suffered by the competitors in the psychotherapy market at issue in that case, 457 U.S. at 475, so here, the recovery sought by AT&T or other competitors would focus on lost competitive opportunities and not on the consumers' service degradation.

This case does not implicate the concerns of passing on, the basis for denying standing in *Illinois Brick Co. v. Illinois,*

431 U.S. 720 (1977). The antitrust injuries suffered by Respondent are distinct from any injury to AT&T, but directly within the realm of injury Congress sought to address with the antitrust laws. *McCready*, 457 U.S. at 484. *See also Associated General Contractors,* 459 U.S. at 540; *Brunswick*, 429 U.S. at 487-88; *Antitrust Law Fundamentals* ¶ 3.05, at 103. Verizon's anticompetitive conduct harmed its rivals, including AT&T, made them less effective competitors and impeded entry by other competitors. J.A. 46-47 (Am. Compl. ¶¶ 52-58). AT&T's claim would not encompass damages resulting from receiving poor local telephone service.[9]

C. Trinko is a Suitable Plaintiff Because the Harm Suffered Is Precisely What the Antitrust Laws Seek to Prevent

Plaintiffs in Trinko's position have strong incentives to identify and prevent anticompetitive conduct. They face a Hobson's choice of selecting between competitors' service degraded as a result of the anticompetitive tactics of the defendant, J.A. 46 (Am Compl. ¶ 52), or purchasing from the defendant directly, with the attendant disadvantages of dealing with a monopolist. Redress for this poor service is only available to the victims if they identify and challenge the underlying source of anticompetitive conduct. Here, as in *McCready*, where "the injury was borne directly by the customers of the competitors," 457 U.S. at 483, "the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." *Id.* at 479.

This is not a case where "the existence of an identifiable class of persons whose self-interest would normally motivate

[9] In any claim by AT&T, antitrust injury would focus on its diminished ability to compete as a consequence of the anticompetitive conduct.

them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general." *Associated General Contractors*, 459 U.S. at 542. Disadvantaged competitors have incentives not to pursue antitrust challenges to incumbent monopolists, upon whom they depend and with whom they must deal on a constant basis, because there are no alternative providers. J.A. 39, 40, 45 (Am. Compl. ¶¶ 19, 24, 47.) "When the immediate victim has some reason to avoid suing" there may be "no first best with the incentive or ability to sue." *Antitrust Law Fundamentals* ¶ 3.05, at 101 (citations omitted). Because its service was dependent on Verizon's treatment of AT&T, Trinko has an identity of interest with Verizon's competitor, underscoring Trinko's suitability to press these claims.

Reaffirming the standing of consumers in Petitioner's position would vindicate the interest in private enforcement of the antitrust laws. As the Court noted in *McCready,* "consistent with congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy." 457 U.S. at 472. Denying standing to Trinko would deny compensation for immediate, distinct injuries resulting from Verizon's anticompetitive conduct. "In the face of [congressional antitrust] policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress." *Id.*, 457 U.S. at 472 n.9 (citations omitted). Consequently, this Court has limited standing only in particular cases, where recovery would have been difficult, such as *parens patriae* recovery for damages to the general economy, or where there was an unacceptable risk of duplicative recovery. *Id.*, 457 U.S. at 473-75 (discussing *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972) and *Illinois Brick, supra*). Similar considerations are simply not implicated in this case. Plaintiff's claims are not duplicative of those of Verizon's competitors, because each consumer

plaintiff's injuries relate specifically and exclusively to the poor service received as a result of Verizon's unlawful conduct. The Court should therefore conclude that Trinko has standing, for "[o]nly by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served." *McCready*, 457 U.S. at 473 n.10 (citations omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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